

- (1) Whether claimant suffered accidental injury arising out of and in the course of his employment on the date alleged;
- (2) Whether claimant provided notice to the respondent of the accident pursuant to K.S.A. 44-520 and if not, whether respondent was prejudiced by this lack of notice;
- (3) What, if any, is the nature and extent of claimant's injury and/or disability;
- (4) What, if any, is the liability of the Kansas Workers Compensation Fund? Also at issue is whether the Fund was timely impleaded in this matter pursuant to K.S.A. 44-567; and
- (5) Whether respondent and the Kansas Workers Compensation Fund are entitled to a credit pursuant to K.S.A. 1992 Supp. 44-510a.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant alleges accidental injury arising out of and in the course of his employment with respondent on February 12, 1993. While working in a pit installing a new pump with David Lackey, claimant was required to scoop out sludge and calcium deposits with a shovel and buckets. He and Mr. Lackey later removed the old pump from the pit. The testimony of the claimant describes the pump as weighing anywhere from two hundred to three hundred (200-300) pounds. The testimony of Mr. Lackey describes the pump as weighing approximately one hundred (100) pounds. Claimant testified that he felt soreness in his lower back after the job was complete. This soreness did not exist prior to the completion of this job.

Claimant suffered a prior back injury on January 3, 1990, for which he underwent surgery with Dr. Chilton. After treatment, in February 1993, he returned to his previous duties shortly before the alleged incident in question.

Claimant did not report the injury to his employer at the time, testifying he was afraid he would lose his job. He also stated he did not feel this was a permanent injury. Claimant again underwent treatment with Dr. Chilton and, after showing no improvement from conservative care, underwent surgery for a herniated disc at L5-S1. This was the same area claimant had injured in 1990.

Claimant discussed his ongoing problems with several of respondent's employees. Claimant consistently denied any work-related connection between respondent's employment and his ongoing back symptomatology from the date of injury in February 1993 until after the surgery in June 1993. Only when claimant attempted to return to work requesting light duty, and was advised light duty was not available for nonwork-related injury conditions, did claimant's allegations of a work-related injury arise. It is also noteworthy that claimant failed to report any work-related aggravation of his condition to Dr. Chilton, merely reporting that the symptoms had grown progressively worse.

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 44-501(a).

K.S.A. 44-508(g) defines burden of proof as follows:

“Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true, on the basis of the whole record.”

It is the function of the trier of fact to decide which testimony is more accurate and more credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 rev. denied 249 Kan. 778 (1991). The claimant's testimony in this matter is inconsistent. Claimant, on one previous occasion, denied any work-related connection to this February 1993 back injury. Only when he was advised light duty was not available for a nonwork-related condition did claimant's story change.

It is the finding of the Appeals Board that claimant has failed to prove by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment on February 12, 1993. As such, claimant's entitlement to an award from the respondent and the Kansas Workers Compensation Fund is eliminated. This finding renders the remaining issues moot.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated April 3, 1995, should be, and is hereby, reversed and the claimant, Terry L. Dotson, is denied award against the respondent Midwest Grain Products, Inc., a qualified self-insured and the Kansas Workers Compensation Fund, for an injury occurring on or about February 12, 1993.

The fees necessary to defray the expenses of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Appino & Achten Reporting Service	
Transcript of Preliminary Hearing	\$241.40
Transcript of Regular Hearing	\$345.00
Transcript of Motion to Dismiss	\$116.00
Deposition of David Lackey	\$130.80
Deposition of Debbie Robinson	\$257.00
Deposition of Kay Pruessner	\$120.00
Deposition of Eunice Dutweiler	\$119.60
Deposition of Peter Bieri, M.D.	\$252.40
AAA Reporting Company	
Deposition of Jonathan D. Chilton, M.D.	\$455.75
Deposition of Michael J. Dreiling	\$298.30
Deposition of Michael J. Poppa, D.O.	\$400.30
Deposition of Gary Gammon	\$200.30
Gene Donginoff Associates	
Deposition of Edward J. Prostic, M.D.	\$269.50
Hostetler & Associates	
Deposition of David Rindom	\$207.65

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James C. Wright, Topeka, Kansas
John B. Rathmel, Overland Park, Kansas
Larry G. Karns, Topeka, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director